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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 197

GEORGE MARSHALL, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 239-242) has not yet been reported. The opinion of the District Court denying motions to dismiss the indictment and for a bill of particulars (R. 13-24) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1949 (R. 242). The petition for

a writ of certiorari was filed July 16, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the resolution creating the House Committee on Un-American Activities and defining the scope of its investigatory powers is constitutional.

2. Whether the trial court correctly held that the documents called for by the subpoena served upon petitioner were pertinent to a legitimate inquiry being made by the Committee.

3. Whether the subpoena was so broad in its sweep as to violate the Fourth Amendment.

4. Whether government employees should have been excluded from the jury because of alleged prejudice in favor of the Government.

5. Whether a deliberate refusal to produce subpoenaed records is wilful even though the party subpœnæd honestly believes the Committee has no power to compel production of the records.

STATUTES AND RULE INVOLVED

R. S. §102, as amended (2 U.S.C. 192), provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee estab-

lished by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

R. S. §104, as amended (2 U.S.C. 194), provides:

Whenever a witness summoned as mentioned in section 102 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall

be to bring the matter before the grand jury for its action.

Rule XI of the Rules of the House of Representatives, 79th Congress, as amended and adopted on January 3, 1945, by H. Res. No. 5, 79th Cong., 1st sess. (91 Cong. Rec. 10, 14-15), provided in pertinent part as follows:[1]

* * * * *

> The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

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[1] The quoted portion of Rule XI was, subsequent to the date of the offense charged against petitioner (April 11, 1946), renumbered as paragraph (1)(q)(2) of Rule XI by Section 121(b) of the Legislative Reorganization Act of August 2, 1946, c. 753, 60 Stat. 823, 828-829.

For the purpose of any such investigation, the Committee on Un-American Activities, or any sub-committee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * *

STATEMENT

Petitioner, chairman of the National Federation for Constitutional Liberties (hereinafter called the Federation), was served with a subpœna *duces tecum* to produce before the Un-American Activities Committee of the House of Representatives (hereinafter called the Committee) "all books, records, documents and correspondence pertaining to the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of all contributors" (R. 144). Petitioner appeared before the Committee in Washington, D. C., on April 11, 1946 (R. 43-44), but refused to produce these documents (R. 7, 8). An indictment (R. 2-3), filed March 21, 1947, in the District Court

for the District of Columbia, charged him with wilfully making default by reason of such refusal, in violation of R.S. §102, as amended (*supra*, pp. 2-3). Petitioner's motion to dismiss the indictment and alternative motion for bill of particulars were denied (R. 13-24), and following a trial by jury he was found guilty (R. 143), and was sentenced to three months' imprisonment and a $500 fine (R. 37-38). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was affirmed (R. 242).

ARGUMENT

1. Petitioner's first contention that the House resolution creating the Committee on Un-American Activities and defining the scope of its investigatory powers is unconstitutional as violative of the First and Fifth Amendments (Pet. 19-21) is without merit. *Josephson* v. *United States*, 165 F. 2d 82, 87-92 (C.A. 2), certiorari denied, 333 U.S. 838; *Barsky* v. *United States*, 167 F. 2d 241, 244-251 (C.A. D. C.), certiorari denied, 334 U.S. 843, petition for rehearing pending; *Eisler* v. *United States*, 170 F. 2d 273, 279 (C.A. D. C.), certiorari granted, 335 U.S. 857, cause ordered removed from docket, June 27, 1949; *Dennis* v. *United States*, 171 F. 2d 986, 987-988 (C.A. D. C.), certiorari granted, limited to a different question, June 27, 1949. We respectfully refer the Court to our brief in the *Eisler* case, *supra*, No. 255, Oct. Term, 1948, pp. 22-64 (see also our brief

in opposition to certiorari in the *Josephson* case, *supra,* No. 535, Oct. Term, 1947, pp. 11-18) for our answers to petitioner's constitutional arguments.

2. Petitioner then urges that the Government failed to establish that the documents called for in the subpœna *duces tecum* were pertinent to the "matter under inquiry" by the Committee, as required by R. S. §102, as amended (*supra,* pp. 2-3), and that the Court of Appeals made no ruling on the question of pertinency (Pet. 22-30). We submit that both contentions are without substance.

a. The trial court decided the issue of pertinency as a matter of law—as was proper (*Sinclair* v. *United States,* 279 U.S. 263, 298)—in favor of the Government. The decision was clearly correct. Before the Committee issued the subpœna, it had before it a speech by Congressman Dies, Chairman of the Special Committee on Un-American Activities of the House of Representatives, 77th Congress (predecessor of the Committee involved in this case), delivered on the floor of the House on September 24, 1942 (R. 47, 48; 88 Cong. Rec. 7441-7458). In the course of this speech, Congressman Dies read a confidential report of the Attorney General (R. 52-54; 88 Cong. Rec. 7446-7447), which indicated that the Federation was a "Communist-front" organization. Congressman Dies' speech also stressed a close alliance between Federation leaders and other

Communist groups.[2] Under these circumstances, the Committee had sound reason to believe that documents relating to the solicitation of funds and a list of the contributors to the Federation were pertinent to its inquiry into subversive organizations and their activities. For, if there was ground to believe that 53 of the officers and sponsors of the Federation (out of a total of 78 (88 Cong. Rec. 7449)) were also important leaders of American Peace Mobilization, "the most completely Communist organization that was ever formed in the United States,"[3] it was certainly pertinent to the Committee's inquiry to ascertain, through its subpœna powers, whether some of the Federation's funds were collected from Communists engaged in "subversive * * * propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution." *Supra,* p. 4. And it was equally pertinent to

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[2] E.g., "* * * 53 of the officers and sponsors of the National Federation were also leaders of the American Peace Mobilization, the most completely Communist organization that was ever formed in the United States. This is the same organization that picketed the White House for 1,500 hours. It is the same organization that provided services and advice for those who wanted to evade the draft law of the country. It is the same organization that instigated strikes in the defense industries of our land" (R. 59; 88 Cong. Rec. 7449).

[3] The strict Communist line followed by American Peace Mobilization is exemplified by its sudden reversal from opposing the draft to a policy of strong aid to the Allies after the German invasion of Russia. 88 Cong. Rec. 7444.

ascertain whether the Federation's funds were used for the support of such propaganda.

The Committee clearly was not limited to investigating the printed pamphlets and literature publicly distributed by the Federation. The Resolution's language is not limited to *printed* propaganda openly circulated. As pointed out by the Court of Appeals (R. 241), "the modern pattern of subversive propaganda, as exemplified by that of the Communist Party, may be composed of two aspects. There is first a public aspect, which by itself may appear quite innocent, and indeed may seem commendable in the objects and causes which it appears to espouse. But this public feature of the subversive propaganda technique is often only a means of hiding, strengthening, and enlarging the sphere of operations of a subversive organization. The real purpose and goal which seeks to destroy our constitutional guarantees, may never be openly and publicly announced * * * ." The secret dissemination of subversive propaganda plainly requires the full investigatory attention of the Committee. While the sources of the Federation's funds are not subversive propaganda *per se,* it is evident that information in respect thereof may be helpful in indicating whether the Federation was actually engaged in making un-American and subversive propaganda, and also the "extent, character, and objects" and the "diffusion" of any such propaganda carried on by the Federation. The Com-

mittee thus had power to require the production of Federation records for an account of its funds; and identification of the contributors was equally within the legitimate scope of its authority. *Barsky* v. *United States, supra,* 167 F. 2d at 244, 246; *United States* v. *Seymour,* 50 F. 2d 930, 939 (D. Nebr.). The Committee's power of inquiry, anticipating all possible cases, was very broad, and the evidence in the subpœnæd records came within the scope of the inquiry. *Townsend* v. *United States,* 95 F. 2d 352, 361 (C.A. D. C.), certiorari denied, 303 U.S. 664.

Petitioner argues that because the Committee may have reached its conclusion of pertinency under the first sub-clause of the Resolution dealing with "un-American" propaganda (*supra,* p. 4), indicated in the *Barsky* case as violating the constitutional requirement of certainty, the refusal to obey the subpoena cannot be punished (Pet. 26). But the *Barsky* opinion (167 F. 2d at 247) stated merely that "perhaps" sub-clause (1), taken alone, would be too vague to be valid, but made no holding to that effect. In our view, sub-clause (1) is not to be read alone, but in connection with the entire Resolution, and in its context is sufficiently definite. See Brief for the United States in the *Eisler* case, *supra,* pp. 58-60. Also, in the Dies speech and in the Attorney General's reports contained therein, the Committee had before it such a wealth of information purporting to link the

Federation with other Communist organizations that the presumption is most reasonable that the Committee considered as applicable sub-clause (2), held definite enough in the *Barsky* case (167 F. 2d at 247).

Nor can petitioner properly demand, as he does (Pet. 25), that the District Court determine for itself, on all the evidence made available at the trial by the parties, whether the Federation could reasonably be said to have been engaging in propaganda within the Committee's jurisdiction. The issue in the present proceeding is solely whether the *Committee* had reasonable grounds to believe, on the information available to it at the time of the issuance of the subpœna, that the Federation's activities fell within its competence. If the Committee had such reasonable belief, obedience to its subpœna was imperative, even though a full and complete investigation might have exonerated the association from any taint of engaging in subversive and un-American propaganda activities. Cf. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208-209, 214-217. Petitioner misses this fundamental point when he states that "care must be taken not to confuse the justification which the Committee might have believed it had for the issuance of a subpoena with the criminal liability of the person served for disregarding it" (Pet. 25-6). On this theory, the Committee could be right in issuing the subpœna and the person

served also be right in disobeying it. This argument, besides being contradictory in itself, ignores the obvious purpose of the criminal statute, R. S. § 102, as amended (*supra*, pp. 2-3), to give force to subpœnas of a Congressional Committee and to compel obedience to subpœnas rightfully issued.

b. Petitioner also complains because, as he says, the Court of Appeals did not decide whether the documents called for in the subpœna were pertinent, but only held that it was proper for the Committee to investigate the Federation (Pet. 27, 28). While the Court of Appeals does not state in so many words that the documents subpœnæd were pertinent, the court so held by necessary implication. The court's statement that the third clause of the Resolution clearly includes "an inquiry as to finances and personnel" (R. 240) is equivalent to a holding of pertinence. The court recognized that the question presented was whether in an investigation of the Federation it was pertinent for the Committee to inquire as to the finances and personnel of the organization (R. 241). The words of an opinion "are to be read in the light of the facts of the case under discussion." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133. Since the Court of Appeals, in the light of the facts of the case, recognized the question of pertinency, and expressly decided that the Federation was subject to the investigatory powers of the Committee, it is plain that the decision neces-

sarily held that the documents subpœnæd were pertinent to the inquiry.[4]

3. Petitioner urges that the subpoena was so broad that it violated the Fourth Amendment (Pet. 30-32). This argument was rightly rejected by the District Court (Holtzoff, D. J.) in its opinion overruling the motion to dismiss the indictment, on the authority of *Brown* v. *United States*, 276 U.S. 134, 138, and *Wheeler* v. *United States*, 226 U.S. 478, 483 (R. 23). The scope of subpœnas in the *Brown*[5] and *Wheeler*[6] cases was much

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[4] A court's opinion may, of course, constitute a certain holding without expressly so stating. *In re Cliquot's Champagne*, 3 Wall. 114, 143-144; *Steel & Tubes* v. *Clayton Mark & Co.*, 21 F. Supp. 326, 334 (D. Del.); *Gallagher* v. *Clark*, 5 F. Supp. 547, 548 (S.D. Iowa); *People ex rel. Hallock* v. *Hennessy*, 206 N.Y. 750, 751, 100 N.E. 407, 408.

[5] The subpoena called for all letters or copies of letters, telegrams or copies of telegrams, incoming or outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, their officers, and agents, and the several members of said Alliance and its predecessor from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods with reference to general meetings, zone meetings, costs, grading, price lists, discounts, prices, curtailment of production, cost bulletins and other items. 276 U.S. at 138-139.

[6] The subpoena called for all cash books, ledgers, journals, and other books of account of Wheeler & Shaw, Inc. for and covering the period between October 1, 1909, and January 1, 1911, all copies of letters and telegrams of Wheeler & Shaw, Inc., signed or purported to be signed by said Wheeler & Shaw, Inc., or by its president or its treasurer during October, November, and December 1909 and the entire year of 1910. 226 U.S. at 483.

broader than the subpœna in the case at bar. In those cases the subpœna covered all kinds of correspondence and records pertaining to the business of the companies involved, whereas here the subpœna was confined narrowly to documents relating to "solicitation and disbursement of funds with a list of all contributors" (R. 144). Though the periods of time[7] covered by the subpœnas in the *Brown* and *Wheeler* cases were somewhat less than that embraced by the instant subpœna,[8] the scope of those subpœnas was far broader in respect of the types of documents called for. In *Hale* v. *Henkel,* 201 U.S. 43, relied upon by petitioner (Pet. 31), the subpœna (201 U.S. at 45) was held so sweeping in its terms as to be unreasonable and to have the effect of completely putting a stop to the business of the company (201 U.S. at 77). Obviously, the subpœna here involved was subject to no such criticism.

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[7] That the period of time covered is not alone determinative of the validity of a subpoena is shown by *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 210, where the subpoena held valid called for "all of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, *1938,* and the date hereof." The record in that case shows that the subpena was dated October 14, *1943.* No. 61, Oct. Term, 1945, R. 11. The period covered was five years. See also *United States* v. *Medical Society,* 26 F. Supp. 55, 57 (D. D. C.) upholding a broad subpoena from January 1, 1932, to October 15, 1938.

[8] The Federation was organized June 7, 1940 (R. 52) and the subpoena was dated January 23, 1946 (R. 144).

4. Petitioner contends that no government employees should have been allowed to serve on the jury, since, in order to retain their jobs and preserve their government records from "black marks," they would have been afraid to acquit petitioner because of the pendency of the President's loyalty investigation of government employees (Pet. 32-34).

There were only two government employees on the jury, a post office employee and an employee of the District of Columbia Government (R. 42, 43). Petitioner exercised two of his three peremptory challenges on non-government employees, who had brothers in the police department (Tr. 98-99, 119-120). The issues which were submitted to the jury were simply whether the Chairman of the Un-American Activities Committee issued and signed a subpœna, whether it was served on petitioner, and whether he, having custody of the records called for, intentionally refused to produce them (R. 138-140). The only reference in the case to subversive activities was at the hearing on the issue of pertinency, which was conducted outside the presence of the jury (Tr. 205). Hence, a verdict of acquittal by the jury could not reasonably be construed as a repudiation of any action or policy of the Attorney General or any other government officer in administering the loyalty program. Under these circumstances, an order excluding all government employees from the jury panel would, we believe,

have been inconsistent with the rule of *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, since government employees constitute a substantial cross-section of the community. And it is settled that, as a general rule, the presence of government employees on the jury in a criminal prosecution does not *ipso facto* deprive the defendant of an impartial trial. *Frazier* v. *United States,* 335 U.S. 497; *United States* v. *Wood,* 299 U.S. 123.

Petitioner's only contention (Pet. 34) to the effect that he was deprived of an opportunity to make "full inquiry" into the possibility of "actual bias" on the part of prospective jurors is based on the fact that he was forbidden to ask them the following question (R. 39; cf. R. 41):

> Pursuant to the Executive Order providing for a loyalty check of Government employees, the records and files of the House Committee on Un-American Activities are to be used in the investigation of Government employees. In view of that fact and the fact that the House Committee on Un-American Activities initiated the proceedings which resulted in this trial, have you any fear that if you were required on the evidence in this case to acquit the defendant, that your action in so doing might prejudice you in any way in your Government employment.

We think the exclusion of this question, as it was phrased, was proper. The preamble necessarily

suggested, contrary to the facts, that a vote for acquittal might well be used to harm the career of a juror in government employ. Consequently, the question, if permitted, would have tended to raise groundless fears that the Committee might hold such jurors suspect of sympathy for Communism and enter notations of such suspicions in its files, which later might prejudice them in loyalty investigations. There was a real possibility, therefore, that the asking of such a question would have the very effect which it was the purpose of the *voir dire* to insure against—a jury that was not wholly impartial.

However, on June 27, 1949, the Court granted certiorari in *Dennis* v. *United States,* 171 F. 2d 986 (C. A. D. C.), No. 14, this Term, on the "question whether government employees could properly serve on the jury which tried" Dennis for a similar violation of R. S. § 102 in failing to respond to a subpœna issued by the Committee. Since the broad question to be discussed in the *Dennis* case is whether government employees are disqualified as a class from jury service in cases of this type, and that issue is also presented here, it is suggested that on this point the Court enter an appropriate order in this case in the light of the final decision to be reached in the *Dennis* case.

5. Petitioner maintains that his refusal to produce the subpœnæd records was not wilful under R. S. §102 (*supra,* pp. 2-3) if he did not act with

an evil purpose but with a bona fide belief that the Committee was acting beyond its power (Pet. 36-37). This argument has been raised in numerous cases under this statute, but has been uniformly rejected. *Fields* v. *United States,* 164 F. 2d 97, 100 (C.A. D. C.), certiorari denied, 332 U.S. 851; *Barsky* v. *United States supra,* 167 F. 2d at 251; *Eisler* v. *United States, supra,* 170 F. 2d at 280; *Townsend* v. *United States,* (C.A. D. C.), 95 F. 2d 352, 357, certiorari denied, 303 U.S. 664. The case of *Screws* v. *United States,* 325 U.S. 91 (Pet. 37), involved a statute entirely different from the one here involved and is not an authority for changing the established rule.

6. Other points pressed less strenuously by petitioner are that the court erred in excluding certain documents in possession of the Committee and the Attorney General (Pet. 34), and in rejecting offers of proof as to activities of the Committee relative to other matters not involved in the case at bar (Pet. 35).

In regard to the documents in the possession of the Committee (R. 26-31) and the Attorney General (R. 31-36), containing all possible information about the Federation, these files were confidential[9] and not admissible in behalf of petitioner.

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[9] Attorney General Order No. 3229, May 2, 1939, in effect at the time of the trial and at present reads: "All official files, documents, records and information in the offices of the Department of Justice, including * * * Federal Bureau of Investigation * * * are to be regarded as confidential * * *. Whenever a subpoena duces tecum is served to produce any

The disclosure of this highly confidential information to the public generally would greatly weaken the power of the Committee and the Attorney General to investigate subversive activities and deter members of the public from reporting such activities for fear that their names might be disclosed. There was no duty on the part of the Government to produce its files for the benefit of petitioner. *Goldman* v. *United States,* 316 U.S. 129, 132; *Jordan* v. *Bondy,* 114 F. 2d 599, 602-603 (C.A. D. C.): *United States* v. *Muraskin,* 99 F. 2d 815, 816 (C.A. 2). Moreover, the requested material had no substantial bearing on the issue of the reasonableness of the Committee's belief that the Federation was carrying on propaganda activities subject to investigation. *Supra,* pp. 7-12.

As to the rejection of offers of proof of other activities of the Committee not involved here (Pet. 35), that question has been decided contrary to petitioner's contention in *Barsky* v. *United States, supra,* 167 F. 2d at 251; see also *Eisler* v. *United States, supra,* 170 F. 2d at 279, holding that evidence that the Committee acted for ulte-

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of such files, documents, records or information, the officers or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation." See refusal of Attorney General's representative to produce documents (R. 101-102). See also *United States* v. *Schine Chain Theaters, Inc.,* 4 F.R.D. 108 (W. D. N.Y.); *United States* v. *Bayarsky,* 51 F. Supp. 974, 975 (D. N.J.).

rior motives not within the scope of its powers or the powers of Congress was properly rejected because the court had no authority to scrutinize the motives of Congress or one of its committees.

CONCLUSION

Subject to the qualification stated at p. 17, *supra,* with regard to the service of government employees on the jury which tried petitioner, we respectfully submit that the petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

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